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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 CannaVest Corporation, a Nevada  
corporation,

11 Plaintiff,

12 v.

13 Kannaway, LLC, a California limited  
14 liability company; et. al,

15 Defendant.

CASE NO. 14-cv-02160-CAB-BLM

**PLAINTIFF'S REPLY TO  
DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

Date: February 12, 2015

Time: 2:00 p.m.

Dept: 4C

Judge: Hon. Cathy A. Bencivengo

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17 I.

18 **SUMMARY OF REPLY**

19 Defendant Kannaway, LLC ("Defendant") did not submit *any evidence* in  
20 opposition to plaintiff's motion for preliminary injunction and instead incorrectly  
21 chose to rely upon the arguments of its attorney. In light of the foregoing, the facts  
22 established in the moving papers are *uncontroverted*, including the following:

- 23 • Plaintiff was the first to use the CANNABIS BEAUTY® mark on personal  
24 care products in commerce and has continuously done so since Sept. 2013.
- 25 • Defendant solicited Plaintiff for a license of that mark which Defendant later  
26 refused to sign.
- 27 • Defendant assigned the CANNABIS BEAUTY DEFINED mark to Plaintiff  
28 which now owns that mark.

- 1 • Defendant has no right to use the marks CANNABIS BEAUTY® or
- 2 CANNABIS BEAUTY DEFINED.
- 3 • Despite the foregoing, Defendant is selling personal care products bearing
- 4 the name CANNABIS BEAUTY DEFINED in competition with Plaintiff.
- 5 • Defendant adopted this identical mark well after Plaintiff started using it and
- 6 with full knowledge of Plaintiff's prior use of the mark.
- 7 • Plaintiff has repeatedly demanded that Defendant stop using the infringing
- 8 mark but Defendant has refused to stop.
- 9 • Customers and other individuals in the hemp-based product industry believe
- 10 that Defendant's multi-level marketing organization is a Ponzi scheme.
- 11 • Defendant's founder, Mr. Llamas, has been indicted for mail and wire fraud
- 12 in connection with a mortgage fraud scheme in California.
- 13 • Customers mistakenly believe that Defendant is affiliated with Plaintiff and
- 14 that Defendant's products are produced or sponsored by CannaVest.
- 15 • ***Defendant's negative reputation is hurting Plaintiff's reputation and***
- 16 ***goodwill.***

17 Despite the foregoing, Defendant weakly asks the Court to deny the motion  
 18 because Defendant plans to file a cross-complaint, alleging that the original idea for  
 19 the CANNABIS BEAUTY® mark was created by Defendant and "pirated" by  
 20 Plaintiff, which is nonsense. Defendant cannot rely upon a vague threat of future  
 21 action to oppose Plaintiff's well-supported motion for preliminary injunction. For  
 22 these reasons, and the other reasons in the record, Plaintiff respectfully requests that  
 23 the Court enjoin Defendant from continuing to offer products containing the mark  
 24 CANNABIS BEAUTY® or any confusingly similar mark.

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1 **II.**

2 **REPLY**

3 **A. PLAINTIFF WILL LIKELY SUFFER IRREPARABLE HARM IN**  
 4 **THE ABSENCE OF PRELIMINARY RELIEF**

5 Despite Defendant's incorrect assertion to the contrary, Plaintiff is not  
 6 relying upon any presumption of irreparable harm. Rather, it has submitted  
 7 credible, *uncontroverted* evidence that Defendant's improper conduct is causing  
 8 Plaintiff to lose control over its business reputation and is damaging Plaintiff's  
 9 goodwill which constitutes irreparable harm. In response to this evidence,  
 10 Defendants have submitted *nothing*.

11 Instead, Defendant mistakenly relies upon the case of *Herb Reed Enters.,*  
 12 *LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250 (9<sup>th</sup> Cir. 2013)—a case that actually  
 13 supports Plaintiff's position.<sup>1</sup> There, the Ninth Circuit clearly stated that,  
 14 "Evidence of loss of control over business reputation and damage to goodwill could  
 15 constitute irreparable harm. See, e.g., *Stuhlbarg Int'l Sales Co., Inc. v. John D.*  
 16 *Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) (holding that evidence of  
 17 loss of customer goodwill supports finding of irreparable harm)." The appellate  
 18 court in *Herb Reed* held that the trial court's record in that case did not contain  
 19 sufficient evidence to show loss of control over business reputation and damage to  
 20 goodwill. The record here is different, as discussed below.

21 Here, the uncontroverted record shows that Customers and other individuals  
 22 in the hemp-based product industry believe that Kannaway's multi-level marketing  
 23 organization is a Ponzi scheme and have expressed those concerns over the internet  
 24 in websites which evaluate multi-level marketing organizations and monitor the  
 25 hemp-based product industry. (Mona, Jr., Decl., ¶ 12 (Dkt No. 13-27, p. 6);  
 26 Markley Decl., ¶ 4 (Dkt No. 13-28, p. 2); and **Exhibit U** (Dkt No. 13-22) (web

27 <sup>1</sup> Defendant also gave the wrong citation to the *Herb Reed* case. The correct cite is  
 28 736 F.3d 1239 (not 1229).

pages wherein members of the public have voiced these concerns.) In addition, Kannaway's founder, Mr. Llamas, has been indicted for mail and wire fraud in connection with a mortgage fraud scheme in the Eastern District of California (**Exhibit V**, the Superseding Indictment against Mr. Llamas (Dkt No. 13-24.)) Lastly, the record shows that Customers and other individuals in the hemp-based product industry mistakenly believe that Kannaway is affiliated with Plaintiff and that Kannaway's CANNABIS BEAUTY DEFINED beauty products are produced or sponsored by CannaVest. As a result, *Kannaway's negative reputation is hurting Plaintiff's reputation and goodwill*. (Mona, Jr., Decl., ¶¶ 10-12 (Dkt No. 13-27, p. 5-6); Markley Decl., ¶¶ 3-4 (Dkt No. 13-26, p. 2.)) Such harm cannot be remedied with monetary damages. In light of the foregoing, Plaintiff is likely to suffer irreparable harm in the absence of preliminary relief.

**B. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF ITS TRADEMARK INFRINGEMENT CLAIM**

As set forth in the moving papers, if a trademark plaintiff shows that the defendant intentionally copied the plaintiff's mark, she is likely to prevail because the courts then presume that the public will be deceived. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1293 (9th Cir. 1992). In this case, the record clearly shows that Kannaway knowingly copied the entirety of Plaintiff's CANNABIS BEAUTY ® mark to improperly trade on Plaintiff's goodwill. Kannaway's promoters, namely Llamas and Nihart, were distributors of CannaVest's products and were very familiar with CannaVest's trademarks, including its CANNABIS BEAUTY® mark. Indeed, they had asked Plaintiff to license the trademark to Kannaway and had entered into negotiations for the trademark license. And when the negotiations broke down, Defendant still proceeded to use the mark over Plaintiff's objections. (Mona, Jr., Decl., ¶¶ 3-4 (Dkt No. 13-27); and Boucher Decl., ¶ 3 (Dkt No. 13-20.)) Based on the foregoing, the presumption of intentional deception to the public clearly should be enforced.

1 Likewise, Defendant does not dispute that Plaintiff was the first user of the  
2 mark in commerce and that Kannaway's use of the identical mark has caused  
3 confusion and will likely continue to cause confusion. And although Defendant  
4 unconvincingly asserts that Plaintiff's CANNABIS BEAUTY® mark is weak, it  
5 does not submit any evidence or credible arguments to support its position—it just  
6 points out that the mark was placed on the Supplemental Register—an immaterial  
7 point that Plaintiff addresses, below. Defendant does not even address, let alone  
8 refute Plaintiff's position that its mark is suggestive and distinctive given the  
9 incongruous association of the two words – CANNABIS + BEAUTY. (Dkt  
10 No. 13-1, 14:11 to 15:4.)

11 Rather, Defendant weakly claims (without any evidentiary support) that the  
12 idea for the CANNABIS BEAUTY® mark was “created by Defendant's sister  
13 company” and “pirated” by Plaintiff and that Defendant will bring a counterclaim  
14 against Plaintiff arising from its claim to own the mark. (Docket No. 16, 9:15-18  
15 and 10:16 to 11:2.) Of course, Defendant's threat of a counterclaim is not a  
16 credible defense to Plaintiff's trademark infringement claim. To the contrary, it  
17 only support Plaintiff's argument that the CANNABIS BEAUTY® mark is strong  
18 and worth protecting. Indeed, if the CANNABIS BEAUTY® mark is weak, as  
19 Defendants incorrectly claim, then why would Defendant claim that it originally  
20 came up with that mark and that Plaintiff “pirated” it and then threaten to file a  
21 counterclaim seeking to establish its rights in the mark? Defendant's position  
22 simply lacks merit.

23 Instead of submitting declarations and other evidence in support of their  
24 opposition, including their outrageous allegation that Mr. Llamas assigned the  
25 CANNABIS BEAUTY DEFINED trademark to Plaintiff under “duress” –  
26 Defendant merely claims that it will file a counterclaim (which of course requires  
27 no evidence). Plaintiff respectfully requests that the Court reject Defendant's plea  
28 to deny the motion based solely upon Defendant's threat of a future counterclaim or

1 its baseless claim of “duress”. Just as the moving party cannot rely upon an  
2 unverified complaint to support its motion for preliminary injunction, the party  
3 opposing such a motion cannot rely upon mere allegations.

4 It should also be noted that the apparent internet search result for the words  
5 “Cannabis Salve” submitted by Defendants is irrelevant, given that Plaintiff is not  
6 claiming trademark rights in “Cannabis Salve.” Rather, an internet search under the  
7 asserted trademark “CANNABIS BEAUTY” is probative. Attached hereto as  
8 **Exhibit X** is a copy of a recent web page reflecting the search results generated by  
9 Google when searching the term CANNABIS BEAUTY. As the Court will see, the  
10 search primarily yields Defendant’s CANNABIS BEAUTY DEFINED product –  
11 not Plaintiff’s product – which shows that Defendant is misleading consumers, and  
12 that Plaintiff is losing control of its reputation and goodwill.

13 Lastly, Defendant’s baseless assertion that Plaintiff’s CEO, Mr. Mona, Jr.,  
14 knew of Defendant’s plans to launch a competing product under the name  
15 CANNABIS BEAUTY DEFINED is totally without merit and without any  
16 evidentiary support. As set forth in the moving papers, Defendant solicited Plaintiff  
17 for a license of the CANNABIS BEAUTY® mark, and the parties cooperated for a  
18 time in the negotiation and drafting of such a license agreement. Moreover,  
19 Defendants assigned ownership of the CANNABIS BEAUTY DEFINED  
20 trademark application to Plaintiff. At that time, Plaintiff had no idea that Defendant  
21 would improperly commence sales of a competing product under the CANNABIS  
22 BEAUTY® mark without first obtaining a license from Plaintiff. Defendant’s  
23 assertion otherwise is baseless.

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**C. PLAINTIFF OWNS THE “CANNABIS BEAUTY DEFINED” MARK WHICH DEFENDANT HAS NO RIGHT TO USE. THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE GRANTED FOR THAT REASON, AS WELL.**

As set forth in the moving papers, Defendants assigned any rights they had in the CANNABIS BEAUTY DEFINED mark to Plaintiff. Defendants have no right to use that mark. (Mona, Jr. Decl. ¶¶ 6 and 8 (Dkt No. 13-27); and **Exhibit N** (Dkt No. 13-15). Defendants have not submitted any evidence showing that Defendants has permission to use that mark. Moreover, as Plaintiff predicted in its motion (Docket No. 13-1, 10:24), Defendants have not produced a witness to authenticate the Purported License Agreement which is a sham and entitled to no weight. In light of the foregoing, the uncontested record shows that Plaintiff is the owner of the CANNABIS BEAUTY DEFINED mark and that Defendants have no right to use it. The motion for preliminary injunction should be granted for that reason, too.

**D. THE FACT THAT PLAINTIFF’S MARK WAS PLACED ON THE SUPPLEMENTAL REGISTER DOES NOT DEFEAT ITS CLAIM.**

Section 27 of the Lanham Act expressly provides that registration on the Supplemental Register is not an admission that the mark does not have acquired distinctiveness. (15 U.S.C. §1095). Moreover, the Ninth Circuit has clearly held that registration on the Supplemental Register does not bar an owner from establishing secondary meaning in subsequent litigation against any alleged infringer using the mark at the time of registration, because registration does not affect substantive common law trademark rights. Indeed, in *California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1454 (9th Cir. 1985), the Ninth Circuit correctly upheld a preliminary injunction barring defendant from infringing a mark that was on the Supplemental Register, expressly rejecting Defendant’s argument here that a party which registers on the Supplemental Register comes away with fewer rights than it would have had if it had not sought registration at all.

Here, Plaintiff has established that its mark is distinctive because of the

1 incongruity of the use of the two terms (CANNABIS+BEAUTY) – an argument  
 2 that was not made at USPTO and that Defendants have ignored. The record also  
 3 shows that Plaintiff was the first to use that mark in commerce, that it has  
 4 continuously used that mark for approximately 17 months in commerce, spending  
 5 considerable time and effort promoting the mark, and that the mark is suggestive  
 6 and inherently distinctive given the incongruous association of the two words –  
 7 CANNABIS+BEAUTY. The record also shows that Defendant intentionally  
 8 copied Plaintiff's mark with an intent to confuse the public. Based on the  
 9 foregoing, Defendant's Supplemental Register argument lacks merit

10 **E. THE BALANCE OF HARDSHIPS CLEARLY FAVORS PLAINTIFF**

11 Defendant asserts that its supposed trademark (CANNABIS BEAUTY  
 12 DEFINED) has obtained secondary meaning in the market and that, as a result,  
 13 Defendant will suffer hardship if the injunction is granted. (Dkt No. 16, 13:9-10.)  
 14 It should also be noted that Defendant has used that mark for significantly less time  
 15 than Plaintiff has used the CANNABIS BEAUTY® mark. Against this backdrop,  
 16 Defendant cannot contest that Plaintiff's mark – CANNABIS BEAUTY – has  
 17 obtained secondary meaning under trademark law, given that Plaintiff has  
 18 continuously used that mark for a significantly longer period of time. It should also  
 19 be noted that, again, Plaintiff owns CANNABIS BEAUTY DEFINED – not  
 20 Defendant. And there is no evidence in the record showing that Defendant has any  
 21 permission to use that mark.

22 In all events, to the extent that Kannaway could potentially suffer some  
 23 hardship, any such potential harm is discounted by the fact that Defendant brought  
 24 the injury upon itself by intentionally adopting Plaintiff's mark in an improper  
 25 attempt to confuse the public. See *Novartis Consumer Health, Inc. v. Johnson &*  
 26 *Johnson-Merck Consumer Pharmaceutical Co.*, 290 F.3d. 578, 596 (3<sup>rd</sup> Cir. 2002.)

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III.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enjoin Kannaway from continuing to offer products containing the mark CANNABIS BEAUTY® or any confusing similar mark.

Respectfully submitted,

DATED: February 5, 2015

HIGGS FLETCHER & MACK LLP

By: /s/Phillip C. Samouris

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